IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5372 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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LARSEN & TOUBRO LTD

Versus

COMMISSIONER OF SALES TAX

Appearance:

MR KH KAJI for Petitioner.

Mr. U.R. Bhatt, AGP for Respondents No. 1-3

CORAM : MR.JUSTICE M.S.SHAH

and

MR.JUSTICE K.A.PUJ

Date of decision: 05/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

Rule. Mr. U.R. Bhatt, learned Asst. Govt. Pleader waives service of Rule for respondents No. 1 to 3.

2. In this petition under Article 226 of the Constitution, the petitioner, Larsen & Toubro Limited, has challenged the order dated 24th May 2002 passed by the Assistant Commissioner of Sales Tax (Appeals-6), Surat, requiring the petitioner to pre-deposit 25% of the amount demanded by respondent No.3, Sales Tax Officer-1, Surat, as sales tax under the Gujarat Sales Tax Act and Central Sales Tax Act along with interest and penalty thereon for the period from 1992-93 to 1994-95. This order has been passed in the stay applications in appeals filed by the petitioner before the Assistant Commissioner of Sales Tax (Appeals-6), respondent No.2 herein. The petitioner has also challenged the coercive steps being taken by the respondent authorities pursuant to the recovery sought to be made by the respondents on the basis of the assessment orders passed by respondent No.3 for the aforesaid period.

3. The challenge to the impugned condition contained in the order dated 24th May 2002 is on the ground that the goods in question were sold in the course of inter-State trade and commerce, when the whole train load of cement was despatched by the petitioner's factory in Maharashtra State to Surat in Gujarat State, in the course of this transit, the wagon loads of cement were sold to various purchasers who had taken delivery of the cement from the Railways. It is also stated that wherever the petitioner company's branch at Surat had taken delivery of the goods from the Railways and thereafter sold the same to the local parties, the petitioner has already offered the amounts covered by such local sales for tax and local sales tax has already been paid on such sales. The petitioner had already paid Central Sales-tax on the inter-State sales to the State of origin, i.e., to the State of Maharashtra.
It is further submitted that when the petitioner demanded some of the documents from the respondents such as Railway Receipts on which the respondents are relying, the petitioners have not been given such information, and therefore, also the impugned order is illegal. It is made clear that since the petitioner has challenged the assessment orders in the appeals filed before the Assistant Commissioner of Sales Tax, the said assessment orders are not the subject matters of this petition.

4. Mr. K.H. Kaji, ld. counsel for the petitioner has placed strong reliance on the decisions of the

Hon'ble Supreme Court in K.C.P.Ltd and Others vs. State of M.P. and Others, (1998) 108 Sales Tax Cases 580, and Shriram Refrigeration Industries Ltd. and Another v. Commercial Tax Officer and Others, (1994) 95 Sales Tax Cases 488 in support of his contention that when the petitioner has already paid sales-tax to the State of Maharashtra for the inter-State sales in question, in respect of the same transactions, the petitioner is not liable to pay local sales-tax imposed in the State of Gujarat and that, therefore, during the pendency of the appeals before the Assistant Commissioner of Sales Tax against the assessment orders passed by the Sales Tax Officer, Surat treating such sales as local sales the appellate authority is bound to grant unconditional stay of recovery pursuant to the assessment orders and demand notices passed by the Sales Tax Officer.

5. On the other hand, Mr. U.R. Bhatt, learned AGP appearing for the respondent authorities, has relied on the averments made in the reply-affidavit filed by the Sales Tax Officer, Surat, stating that though the petitioner manufactures cement in the State of Maharashtra, such cement is sold to various distributors and stockists through its depots situate in various States, just as in this case the cement has been brought to the depots in the State of Gujarat and that it is after such branch transfers that the petitioner effects sale of cement to the purchasers. It is stated that if the purchasers had purchased cement in the course of transit from the State of Maharashtra to the State of Gujarat, all the documents including the Railway Receipts should be in the name of the purchasers but the petitioner has not produced any proper evidence regarding the sales effected which are alleged to be inter-State sales. Since the petitioner was not cooperating, the Railway authorities were contacted and the Assessing Officer came to the conclusion that various transactions were such that the goods were transferred from the factory in Maharashtra to the petitioner's depot in Surat in Gujarat State and thereafter the goods were sold to purchasers in the State of Gujarat. The so-called transactions were, therefore, not inter-State sales but were local sales which took place within the State of Gujarat and hence the petitioner is liable to pay taxes as per details given in the documents annexed to the petition, and also incorporated in the petitioner's letter dated 24.5.2002 at Page 32 of the Paper Book.

The learned AGP has also placed strong reliance on the decision of the Hon'ble Supreme Court in State of Haryana Vs. Maruti Udyog Ltd and others 2000(7) S.C.C.

348, wherein it has been held that right of appeal is the creature of the statute and has to be exercised within the limits and according to the procedure provided by law, when the Statute vests a discretion in the appellate authority to entertain the appeal if it is filed within sixty days and the amount of tax assessed along with penalty and interest, if any, has been paid, with a further discretion conferred upon the appellate authority to dispense with the deposit of the amount on proof of the fact that the appellant was unable to pay the amount. It is further submitted that the question of the petitioner having any alleged prima facie case is not required to be considered and the only question is whether the petitioner was unable to pay the whole of the amount of tax assessed with penalty. Mr. Bhatt also states that the appellate authority is ready to hear the pending appeals expeditiously.

6. In the instant case, the petitioner has filed appeals before respondent No.2 appellate authority under sub-section (1) of Section 65 of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as 'the Act'). Sub-section (4) thereof reads as under :

(4) No appeal against an order of assessment with or without penalty or against an order imposing penalty shall ordinarily be entertained by an appellate authority, unless such appeal is accompanied by satisfactory proof of payment of the tax with or without penalty or, as the case may be, of the payment of the penalty in respect of which an appeal has been preferred :

Provided that an appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order :-

(a) without payment of tax with penalty if any or as the case may be, of the penalty, or

(b) on proof of payment of such smaller sum as it may consider reasonable, or

(c) on the appellant furnishing in the prescribed manner security for such amount as the appellate authority may direct."

Considering the language of the aforesaid provisions

contained in the Gujarat Sales Tax Act, 1969, it is clear that the discretion conferred upon the appellate authority for waiving pre-deposit is not circumscribed by the criterion of financial inability of the assessee to pay the tax demanded. The appellate authority is granted wide discretion requiring the appellant to pay such smaller sum as the appellate authority may consider reasonable. The appellate authority is, therefore, required to consider both the questions, i.e. to ascertain whether the appellant has a prima facie case on merits and also the aspect about economic hardship of the appellant.

7. Since the appellate authority, in the instant case, is prepared to hear the appeal expeditiously, we have, prima facie, considered the facts of the case and only for the limited purpose of considering whether the interim order passed by the appellate authority meets with the test contained in the aforesaid statutory provisions. We have also considered the breakup of the tax, interest and penalty demanded by the respondent authorities. There is no dispute about the fact that for all the relevant years under consideration, the Assessing Officer has found that the total tax payable is approximately Rs. 2.48 crores, out of which the petitioner has already paid Rs. 81.84 lakhs. Hence the balance amount of Rs. 1.66 crores approximately is still payable by the petitioner as per the demand. On the aforesaid amounts, the respondent authorities have calculated interest and penalty which works out to Rs. 4.22 crores (approximately) in the aggregate and that is how the total tax, interest and penalty demanded by the respondents from the petitioner works out to Rs. 5.88 crores approximately.

8. Having regard to the facts and circumstances of the case and the question whether the transactions in question were inter-State sales or local sales is a question of fact which would be gone into by the appellate authority, we are of the view that the interests of justice would be served if the petitioner is required to pay 25% of only the balance tax found to be payable by the petitioner, that is 25% of Rs. 1,66,16,983/=, and not any part of the amount of interest and penalty as demanded by the respondents at this stage.

9. In view of the above discussion, the petition is partly allowed and the impugned order dated 24th May 2002 passed by respondent No.2, Assistant Commissioner of Sales Tax (Appeals-6), Surat, is modified to the effect that the pre-deposit shall be confined to 25% of the

amount of balance tax demanded from the petitioners, that is 25 per cent of Rs. 1,66,16,983/=. The amount as aforesaid shall be paid by the petitioner to respondent No.2 by 5th of September 2002, but no part of the amount of interest or penalty shall be required to be paid by the petitioner at this stage.

10. Upon the aforesaid amount being deposited, there shall be interim stay of recovery of the amount of tax, interest and penalty demanded by respondent No.3, and respondent No.2 Appellate Authority shall hear and decide the petitioner's appeals qua the assessment years 1992-93 to 1994-95 as expeditiously as possible and in any case by 31st October 2002. Respondent No.2 appellate authority shall treat the appeal as maintainable and proceed to hear the appeals on merits.

Rule is made absolute to the above extent.

11. We may record at this stage that at the time of filing this petition the petitioner made a grievance against coercive recovery which was being made by the respondent authorities including the attachment of the petitioner's bank accounts. By our ad-interim order, we had directed the respondents not to insist for recovery of any amount and the said ad-interim relief was continued from time to time. In view of the aforesaid orders, the said ad-interim relief shall continue till 5th September 2002 and if the petitioner deposits the amount as stipulated in this order within the aforesaid time limit, the ad-interim relief shall continue till the disposal of the appeals. The petitioner shall also cooperate with the appellate authority for expeditious disposal of the appeals, failing which the respondent authorities shall be at liberty to move this Court for appropriate reliefs/orders.

[M.S. Shah, J.]

rmr. [K.A. Puj, J.]